Petition

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

IDULFO ZAVALA-PIZANO, Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE

UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

I. The trial court was guilty of judicial misconduct which denied Petitioner a fair trial.

1. Petitioner was denied a fair trial by the trial court's admission of testimonial evidence that lacked sufficient foundation to be admissible.

2. The trial court was guilty of judicial misconduct which denied Petitioner a fair trial.

3. The trial court erred in not granting Petitioner's motion for judgment of acquittal.

4. The trial court failed to properly instruct the jury regarding the applicable law.

II. Petitioner's constitutional right to confrontation was abrogated by the trial court's limitation of the cross-examination of government's

cross-examination of government's witness William Danielson.

III. The government's action of deporting the alleged aliens denied Petitioner due process of law and the right to compulsory process.

IV. The indictment was so constitutionally defective as to warrant reversal of Petitioner's conviction.

1. The trial court erred in failing to dismiss the indictment against Petitioner for lack of specificity.

2. Petitioner's conviction on substantive Counts I and II must be reversed because of the duplicitous nature of the charging document.

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IDULFO ZAVALA-PIZANO, Petitioner,

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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

IDULFO ZAVALA-PIZANO, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above case on March 30, 1981.

OPINONS BELOW

The opinion of the Ninth Circuit Court of Appeals is unrecorded and is

printed in Appendix D hereto, infra, page D1. The Journal Entry of Judgment of the United States District Court for the District of Arizona is printed in Appendix A hereto, infra, page 1.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 30, 1981. A timely petitioner for rehearing was denied on June 16, 1981, Appendix A infra, page . The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C., sec. 1254(1).

STATEMENT OF THE CASE

On March 30, 1981, the clerk of the United States Court of Appeals for the Ninth Circuit Court Judges Hug and Canby, and by District Court Judge East, affirming the convictions of defendant-appellant. Undersigned counsel verily believes there are a number of areas raised on appeal by defendant-appellant which the court overlooked or misapprehended, as set forth more fully in the remainder of this Petition, pursuant to Rule 40, Federal Rules of Appellate Procedures.

This is an Appeal in Cause No. CR-80-26-1 TFM(TUC) from a judgment of guilt pursuant to the verdict of a jury in the United States District Court for the District of Arizona at Tucson, Arizona.

On January 29, 1980, the Defendant

below, IDULFO ZAVALA-PIZANO (hereinaft referred to as ZAVALA), was indicted by the Federal Grand Jury along with fourteen (14) other individuals. ZAVALA was charged in Count I with Conspiracy to Transport Illegal Aliens in violation of 18 U.S.C. §371, and in Counts II through VII with Transportation of Illegal Aliens in violation of 8 U.S.C. §1324(a)(2)(CR1). Following his arrest, ZAVALA was released on a twenty-five thousand dollar ($25,000.00) Criminal Property Bond (CR3). At his arraignment on February 5, 1980, ZAVALA entered a plea of not guilty to all counts of the indictment and trial was set for March 25, 1980 (CR47).

ZAVALA filed a variety of pretrial motions (CR81-85 and 112), which were argued March 10, 1980 (CR149). Additionally, ZAVALA joined in various motions filed by co-defendants (CR152). All of

these pretrial motions were denied by the trial court on March 17, 1980 (CR157).

A jury trial on the indictment commenced March 25, 1980 (CR195). On April 1, 1980, the jury returned a verdict on the indictment (CR216). The jury's verdict with regard to ZAVALA was guilty on Counts I and II, not guilty on Counts III through VII (CR217).

On April 24, 1980, ZAVALA appeared for sentencing before the Honorable Thomas F. Murphy, Senior United States District Court Judge, who imposed a sentence of five (5) years imprisonment and a ten thousand dollar ($10,000.00) fine as to Count I, and five (5) years imprisonment on Count II, the sentence in Count II to run consecutively to that in Count I (CR241). ZAVALA filed a Notice of Appeal (CR243) and posted a twenty-five thousand dollar ($25,000.00)

Criminal Appeal Property Bond as approved by the Court's endorsement thereon. (CR253).

Statement of Facts

All references made hereafter to the Reporter's Transcript of Proceedings in the trial court will be designated by "RT" followed by the page number referred to, i.e. RT111 would refer to page 111 of the Reporter's Transcript.

Count I alleged the existence of a conspiracy covering the time span from March 10, 1978 to May 31, 1979, and encompasing two stated overt acts. The first overt act was alleged to have occurred March 29, 1978, when Bill Morgan traveled from Phoenix to Nogales, Arizona. The second overt act is alleged to have occurred April 29, 1979, when Jodene Carnes traveled to Sonoita, Arizona in a motor home vehicle.

Count II of the indictment alleged that between March 25, 1978 and March 29, 1978, approximately twenty-eight (28) aliens were illegally transported (CR1). All of the testimony as it applies to ZAVALA was obtained from government witnesses William Danielson and James Lough.

Mr. Danielson testified that in mid-March 1978, he was running his own business, Kona R.V., when he was contacted by Gerald Dodson (RT4). In December 1977, Danielson had met with Dodson and Hymie (alleged nickname for ZAVALA) regarding the rental of motor homes for shipping aliens (RT6-7). When Dodson called Danielson in mid-March 1978, he said he needed a motor home. He later arrived at Danielson's business with four other men, one of whom was Bill Morgan (RT8). Dodson then paid a two

hundred fifty dollar ($250.00) deposit and rented a 1977 Titan Motor Home (RT9-10). Dodson returned the motor home seven (7) days later with 4400 miles indicated (RT11). Dodson said he had made two trips to Rupert, Idaho (RT12).

Two weeks later, Hymie contacted Danielson. Hymie came to Danielson's business accompanied by Paul Luoma and Susan Fleminger. Hymie told Danielson that he wanted him to pick up a load near Nogales (RT13-15). Danielson told Hymie that he couldn't go down (RT16). Thereafter, a motor home was rented to Susan Fleminger after Hymie paid a two hundred fifty dollar ($250.00) cash deposit. Paul and Susan drove off with the motor home. Three days later they brought the motor home back to the lot and counted out $8,700.00 for 31 aliens they were supposed to have taken up (RT16-17).

Danielson was told by Paul and Susan that they had taken 31 aliens to Idaho (RT19). According to Danielson's testimony, each alien was supposed to pay $300.00 which Danielson suspected was given to Hymie (RT20). During the period that Luomo and Fleminger were gone, Hymie came by himself to see Danielson. Hymie stated he would need another motor home and he wanted Danielson to take Dodson's place (RT20). In return for hiring the drivers, Danielson was to get a fifty percent (50%) net of the profits, which he agreed to (RT21). Following the above trips, Dodson agains contacted Danielson and told him he needed a motor home. Dodson paid the deposit on a Superior Motor Home which was picked up form Danielson by Russell Galloway (RT23-24). When this motor home came back to the lot, 18 aliens were in it. The aliens were given

food and water and then ZAVALA collected $150.00, after which the aliens were put back in the motor home and sent to Idaho. The next load was approximately April (RT25). This trip began when Dodson called Danielson wanting a motor home. Dodson paid the deposit and the Superior Motor Home was rented to Galloway (RT26). The next trip was either early April or late March when Danielson and Morgan went down to Nogales after being contacted over the telephone by Hymie (RT28). A contract was made out to Margan renting an Open Road motor home and Morgan and Danielson drove in separate vehicles to pick up 18 aliens Hymie said would be waiting (RT29). Danielson went by the pick-up place, as did Morgan, in the motor home. Danielson got lost and did not see Morgan make the pick-up. Danielson returned to Phoenix and waited for

Morgan to arrive (RT33). In Phoenix at Danielson's shop, the aliens were fed and watered and $150.00 was collected from each by ZAVALA. Morgan and Susan then drove off with the motor home containing the aliens (RT34). The motor home was turned in and two days later, Danielson was paid $2,000 by ZAVALA (RT35).

About a week after the end of March, Danielson was contacted by Hymie, who wanted two motor homes. Danielson arranged for two drivers (RT38). The following morning, one of the motor homes returned with 14 aliens and the same process was followed, including the collection of money. Hymie told Danielson that the 14 aliens did not have the money to continue the trip and that he was going to dump them at an orange grove (RT39-40). Morgan loaded the aliens into a motor home, left, and then returned the

motor home to the lot. The second motor home then came into Danielson's lot and the occupants were fed and watered. Morgan and Susan then left with the load (RT41). While they were gone, Danielson received a phone call from Luomo advising him he had been ripped off because the 14 guys who supposedly didn't have the money to continue had been picked up and taken up to Idaho on that same load. Two days later, Fleminger and Morgan returned. Danielson then went to Hymie's place where he confronted Susan, Morgan, Hymie and his wife about Luoma's accusation. Hymie was counting out money and Susan and Morgan were sitting at the table counting out money when Danielson asked for his money. When Danielson got home, he discovered that there was only $2,800 rather than the $3,800 that he was supposed to receive. He then severed

relationships right there. However, prior to severing the relationship, Danielson had taken his wife and kids down to Nogales to exchange money for ZAVALA, bringing back $5,000.00 in American money (RT43). After exchanging the money, Danielson gave it to Hymie, who paid Danielson $2,000.00 for the load he went down on with Morgan (RT44). At the time that the relationship with Hymie was severed, Luoma took Danielson down and introduced him to Jose Zavala's ex-wife. This occurred about June or July (RT48).

James Lough testified that he was a criminal investigator in the United States Immigration and Naturalization Service and had been so for approximately 24 1/2 years (RT437). Lough identified ZAVALA as a person he had had under surveillance at 2139 North 24th Place, Phoenix, Arizona (RT438). The period of surveillance on ZAVALA was approximately

eight months from August 1978, through February or March 1979, and covered two or three observations per week for two or three hours per week (RT442). During this entire period of surveillance, Lough observed ZAVALA in the presence of Truman Roberts, on one occasion. This occurred at Mr. Roberts' house while Lough had Roberts under surveillance. Lough observed no illegal activity between Roberts and ZAVALA, did not observe them in the company of people known as smugglers and did not observe any recreational vehicles in the area. During the entire eight months of surveillance of ZAVALA, Lough observed him in the company of no one else charged in the conspiracy except for one occasion he was seen talking to Roberts at his home and when he was observed in the presence of his brother Jose (RT446). ZAVALA was never seen by Lough in the presence of anyone named as

a driver by a witness during the proceedings. Lough also indicated that he was unaware that ZAVALA was employed by Roberts in his landscaping business during this period of time (RT447).

This concluded the initial Government's case against ZAVALA.

It should be noted that the term "alien" as used above and hereafter is used as a descriptive term only and should not be construed as an admission by ZAVALA.

QUESTIONS PRESENTED

1. The trial court was guilty of judicial misconduct which denied Petitioner a fair trial.

    1. Petitioner was denied a fair trial by the trial court's admission of testimonial evidence that lacked sufficient foundation to be admissible.

2. The trial court was guilty of judicial misconduct which denied Petitioner a fair trial.

3. The trial court erred in not granting Petitioner's motion for judgment of acquittal.

4. The trial court failed to properly instruct the jury regarding the applicable law.

II. Petitioner's constitutional right to confrontation was abrogated by by the trial court's limitation of the cross-examination of government's witness William Danielson.

III. The government's action of deporting the alleged aliens denied Petitioner due process of law and the right to compulsory process.

IV. The indictment was so constitutionally defective as to warrant reversal of petitioner's conviction.

1. The trial court erred in failing to dismiss the indictment against petitioner for lack of specificity.

2. Petitioner's conviction on substantive counts I and II must be reversed because of the duplicitous nature of the charging document.

THE RULINGS BELOW

I. The Trial Court Was Guilty of Judicial Misconduct Which Denied Petitioner a Fair Trial.

1. Petitioner was denied a fair trial by the trial court's admission of testimonial evidence that lacked sufficient foundation to be admissible.

Over the objections of defense counsel, government witness William Danielson was repeatedly permitted to show that he had personal knowledge of the matter. First, he was permitted to

characterize people as "aliens" without any foundation as to whether that term was ever used by any alleged conspirator or whether he had any personal knowledge that would indicate that these individuals were "aliens" within the statutory definition of that term as set forth in 8 U.S.C.A., Sec. 1324(a)(2). Timely objection was made by counsel, and overruled (RT7, 17). In addition, Motions to Strike Testimony utilizing the term "alien" were made, and denied (RT17, 77).

Next, the witness was permitted to testify that people were "Mexican" without any foundation being laid for that opinion. A timely objection was made and overruled (RT59-60). Finally, the witness was permitted to testify that the money paid by the "aliens" was given to Hymie (ZAVALA) without any foundation that he had personal knowledge that this was true. He never testified that he saw the money

given to Hymie at that time or that anyone had told him that the money was given to Hymie. A timely objection was made and overruled (RT20).

2. The trial court was guilty of judicial misconduct which denied Petitioner a fair trial.

As is frequently the case in determining questions of judicial misconduct, reference cannot be made to a single statement or incident that establishes misconduct. Rather, the trial as a whole must be evaluated to determine whether the conduct of the trial judge prevented a fair trial. The misconduct by the trial judge in this case falls into three broad categories. First, the disparagement of defense counsel in the presence of the jury tended to convey to the jury the notion that the defense was frivolous or not believable. The second area of misconduct was the refusal of the court to permit side-bar discussions, or

other discussions out of the presence of the jury, regarding the admissibility of evidence. Many of these arguments, in the presence of the jury, dealt with legal issues and sensitive factual distinctions which should not have been handled in the presence of the jury. The third area of misconduct involved the court's interposing its opinion regarding the credibility of the government's witness.

A disparagement of defense counsel did not always occur in the presence of the jury. However, when it occurred out of the presence of the jury, it frequently had impact on what occurred in the courtroom before the jury. While arguing a Motion to Strike use of the term "alien" the following exchange took place (RT77):

> Mr. Rempe: I would cite to the court . . .
>
> The Court: No, I don't want a cite.

Counsel then requested that the court give a cautionary instruction regarding the term "alien" which was disparagingly denied.

After the court had limited the cross-examination of the critical government witness, William Danielson, counsel attempted to respond to the court and was told "Please, you lost that one, counsel. You know, you win some, you lose some. Go ahead, please." (RT83) During the continuing cross-examination of this witness, after counsel had asked a question, the court interjected, "No, no, counsel, this is not cross-examination." (RT86). During the cross-examination of government witness Keith Elsworth, counsel asked a question and the court interposed the statement, "Do you really want him to answer that question? You want to know how he knows something? You heard the question. I'm only asking

whether you want him to answer the question." (RT117). Later in the cross-examination of this same witness, in speaking to the court, defense counsel made reference to a portion of the statute which elicited the response, "I know where it is, I read it every night." (RT151) from the sarcastic court. The above statements were made in the presence of the jury and are illustrative of the disparaging treatment by the court to defense counsel. This disparagement by the court must undermine the credibility of the defense in the eyes of the jury.

It is improper for the court to disparage a defendant or his counsel and a lawyer is not obligated to suffer judicial abuse. Berry v. U.S., 283 F.2d 465 (8th Cir. 1960); Carter v. U.S., 373 F.2d 911 (9th Cir. 1967).

Repeatedly, counsel attempted to conduct sensitive legal arguments at side-bar out of the presence of the jury. Each such attempt was thwarted by the court (RT52). The court's position was affirmatively stated "I'll hear everything in court, counsel." (RT16). By refusing to conduct sensitive discussions at side-bar, the court placed defense counsel in the untenable position of either arguing sensitive legal matters in the presence of the jury or not pursuing the matter further.

The interposing of the trial court's view of the credibility of certain witnesses is perhaps the most glaring misconduct since it exceeds a power or discretionary authority of the trial court. At the very onset of cross-examination of William Danielson, perhaps the most critical of the government's witnesses, the following exchange took

place (RT81):

> The Court: Is there any question in your mind as to whether he told the truth to the Grand Jury about his name and address, and then what he said yesterday to this jury?
>
> Mr. Rempe: I was just. . .
>
> The Court: Is there any question about the truth of it?

This question is particularly damaging in view of the court's response to an earlier objection that this witness was speculating as to what happened. At that time, the court responded that counsel could develop on cross-examination the circumstances surrounding the observation, which implied that the observation had in fact taken place (RT20). Later, in questioning another witness, counsel's question was interrupted by the court stating, "No, not allegedly, counsel, he's under oath and he said under oath, so you

can use the phrase that he swore to so and so. Don't you think that would be more fitting?" (RT225). The interposing of the court's view of credibility can occur in a variety of ways. In Gudger v. U.S., 314 F.2d 268, (D.C. 1963) trial court admonished counsel for impuning the character of a government agent. In U.S. v. Williams, 473 F.2d 507 (5th Cir. 1973) the conviction was reversed following the trial judge's comments on the credibility of a witness. In United States v. Cisneros, 491 F.2d 1068, (5th Cir. 1974), the trial court committed reversible error by overreaching and commenting on the credibility of witnesses. In a case, which is remarkably similar to the facts in this case, the conviction was reversed in U.S. v. Allen, 501 F.2d 1 (9th Cir. 1974) where the trial court refused to permit defense counsel to inquire of an informant's address,

restricted defense counsel's questions directed to the witnesses' motives for testifying and possible bias or prejudice, otherwise overstepped the bounds of judicial propriety by excessively interjecting himself into the proceedings. Similarly, in Young v. U.S., 346 F.2d 793 (D.C. 1965), a new trial was granted due to the interference of the trial judge with defense counsel's conduct and in cutting off cross-examination.

Allegations of judicial misconduct need not be directed to the motivation or skill of the trial court. Judicial misconduct can be committed by a trial judge, recognized as one of the "best and most conscientious in this nation" by the reviewing Court of Appeals, U.S. v. Frazier, 580 F.2d 229 (6th Cir. 1978) cert. den. 439 U.S. 1051. The reversal of a conviction based upon judicial misconduct is no stranger to this trial

court, see U.S. v. Allsup, 566 F.2d 68 (9th Cir. 1977), in which the Court improperly interjected itself into the proceedings in an attempt to rehabilitate a crucial government witness.

3. The trial court erred in not granting appellant's motion for judgment of acquittal.

A standard that has been applied to determine when a Judgment of Acquittal should be granted, is as follows:

> viewing the evidence presented most favorably to the government, a reasonably minded jury could accept the relevant and admissible evidence as adequate and sifficient to support the conclusion of defendant's guilt beyond a reasonable doubt. U.S. v. Kohlman, 491 F.2d 1250 (5th Cir. 1974).

In the absence of evidence meeting the above standard, a judgment of acquittal should be granted.

Absolutely no evidence was presented during this trial to support the

conclusion that the individuals in question had entered the United States in violation of the law or that their last entry into the United States occurred less than three years prior.

4. The trial court failed to properly instruct the jury regarding the applicable law.

The court totally misled defense counsel by stating that it would give certain instructions. Then, without prior notice to defendants' counsel, the court gave only portions of those instructions while either refusing or neglecting to give other which it had already approved. Without being afforded a copy of the court's proposed instructions, defense counsel were at a distinct disadvantage in trying to follow the court's instructions while at the same time determining whether or not it had followed its own approved instructions.

When ROBERTS' (co-defendant at trial court) counsel attempted to make some specific and detailed objections to the court's instructions, the court proceeded to summarily cut him off. Finally, the Court indicated to ROBERTS' counsel that he had already made his record and if the court did not give the instructions as approved then he had an "exception" thereto (RT595-599). ROBERTS' counsel specifically objected to the trial court's failure to give counsel a copy of its proposed instructions (RT597-598), its failure to give ROBERTS' requested instructions regarding knowledge (RT596), its failure to properly define the government's burden of proof (RT596), its failure to make clear to the jury that each and every essential element had to be proved by the government beyond a reasonable doubt (RT596), its giving an erroneous conspiracy instruction (RT596-

597), its giving an erroneous instruction regarding accomplice and immunized witnesses' testimony (RT596), its failure to give an instruction regarding proof of alienage and expert witnesses (RT596-597), and to the court's procedure in first approving instructions and then not giving the instructions as approved.

After making these objections known, the trial court stated:

> Counsel, you have an exception for all of the instructions you gave me in writing that I didn't give . . ." (RT598); see also RT 595-597).

In United States v. Goodman, 457 F.2d 68 (9th Cir. 1972 the court approved the practice of incorporating objections previously made. Here, the trial court had stated that it would give some twenty-eight (28) out of forty-two (42) of ROBERTS' proposed instructions (RT561-566).

At no time prior to actually doing so, did the trial court inform counsel that the court was going to substantially alter each of the approved instructions. Under these circumstances, clearly, any variation by the trial court from the approved proposed instructions would not have to be objected to on an individual basis. See Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (9th Cir. 1954); United States v. Lyles, 593 F.2d 182 (2nd Cir. 1979).

II. Appellant's Constitutional Right To Confrontation Was Abrogated By The Trial Court's Limitation Of The Cross-Examination Of William Danielson.

During cross-examination, William Danielson testified that he had previously cooperated with law enforcement agencies in transporting cases. This prior

cooperation involved a transportation of people from another country into the United States. Counsel was prevented from making further inquiry into the witness' involvement in any resulting bias, and prejudice or interest that he might have (RT82-83).

III. The Government's Action In Deporting The Alleged Aliens Denies Petitioner Due Process Of Law And The Right To Compulsory Process.

In 1971 the Ninth Circuit held that it was a denial of due process of law and the right to compulsory process, for the government, in an alien transportation case, to deport the aliens before the defendant had an opportunity to interview them. United States v. Mendez-Rodrigues, 450 F.2d 1 (9th Cir. 1971). Despite some erosion, the basic

premise of Mendez-Rodriguez is still good law.

The government deported, or allowed to voluntarily return to Mexico, every single alleged alien it had ever apprehended in connection with this case. The government's action was a denial of the rights guaranteed in Mendez-Rodriguez.

IV. The Indictment Was So Constitutionally Defective As To Warrant Reversal Of Petitioner's Conviction.

1. The trial court erred in failing to dismiss the indictment for lack of specificity.

An indictment is supposed to be "a plain concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c), Federal Rules of Criminal Procedure.

Although indictments are no longer invalidated for minor and technical deficiencies, Smith v. U.S., 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959), they still must be framed to provide certain essential safeguards. Among them are:

- the right to be informed of the nature of the accusation so that the defendant may intelligently prepare his defense. Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962).

- the right to an indictment sufficiently specific to provide double jeopardy protection. Russell v. United States, supra.

- the right to an indictment sufficiently specific so that the defendant may be assured that the government is prosecuting the same

case for which the grand jury indicted him. United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976).

The indictment (CR 1) in this case is defective and fails to meet these requirements and guarantees because:

- it fails to name or give any other means of identifying the persons allegedly transported.

- it fails to provide any means of distinguishing this group of aliens from any other group of aliens.

- it fails to specify the place of the offenses with sufficient detail.

- it fails to specify the means used to carry out the offense.

- it fails to identify or distinguish in any meaningful way

the particular transaction which the defendant is charged.

The requirement that an indictment provide sufficient detail so that defendant may intelligently prepare his defense is grounded in the Sixth Amendment right "to be informed of the nature and cause of the accusation. . ." As pointed out in United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1970), this right "is basic to the proper functioning of our adversary system of justice."

2. Petitioner's conviction on substantive counts I and II must be reversed because of the duplicitous nature of the charging document.

Duplicity is the joining in a single count, of two or more separate offenses. Duplicity is prohibited by the Sixth Amendment of the United States Constitution which requires that a criminal defendant be informed of the nature

and cause of the charges against him. This Constitutional prohibition is implemented by the Federal Rules of Criminal Procedure by Rule 7(c) which requires that an indictment be a plain, concise and definite written statement of the essential facts constituting the charged offense and by Rule 8(a) which permits two or more offenses to be charged in the same indictment only when each offense is charged in a separate count.

Prohibiting duplicity resulted from the recognized need to clearly establish the basis for a conviction. The correlation between a verdict and a non-duplicitous indictment accomplishes this. To do otherwise and charge multiple offenses in a single count of an indictment would be extremely prejudicial to a defendant. As pointed out by Wright, Federal Practice and Procedure, Criminal

Section 142, at page 311:

> The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit of another offense contained in the same count. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others or guilty of all. It is conceivable that this could prejudice defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy.

In United States v. Leggett, 321 F.2d 566 (4th Cri. 1962), the defendant was charged in one count under a statute that defined two separate offenses. Because statutory language was used in the indictment, one count served to charge the defendant with the two separate offenses. In holding that the indictment was duplicitous, the court stated:

> The statute defines two separate offenses and the defendant is entitled to

> know for which he is being prosecuted, not only that he might be prepared to defend the charge but for protection against a future prosecution for one or the other of the offenses. 321 F.2d at 570.

Petitioner ZAVALA is charged under the indictment in question on substantive Counts I and II for illegally transporting aliens within the United States in violation of Title 8, United States Code, §1324(a)(2). Title 8, United States Code, §1324(a)(2) provides that:

> Any person, . . .who knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, within the United States by means of transportation or otherwise, in furtherance of such violation of law <u>any alien</u>, including an alien crewman, not duly admitted by immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this act, or any other law relating to the immigration or expulsion of aliens

> shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not exceeding $2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs. (Emphasis added.

As such, Title 8, United States Code, §1324(a)(2) delineates a separate punishment for each alien who is transported. As such, the transportation or attempted transportation of each alien is a separate crime, which, pursuant to Rule 8(a) of the Federal Rules of Criminal Procedure, must be alleged in a separate count to avoid subjecting the defendant to the vices of a duplicitous indictment.

This specific issue was faced by the District Court of California in United States v. Martinez-Gonzales, 89 F. Supp. 62 (S.D.Ca. 1950). In that case, the defendant was charged in one count for having transported into the United States

four different aliens. A jury acquitted the defendant on charges of having transported three of the aliens, but found him guilty of transporting the fourth. In overturning the defendant's conviction, the court found the indictment to be duplicitous, because it charged greater than one substantive offense per count. The court stated further that neither judge nor jury could find a defendant guilty of one portion of a count and not guilty of another.

The court went on to discuss three separate tests which could be used to determine if a single count of the indictment alleged one or two substantive offenses. The court stated that two offenses existed, which must be charged in separate counts if (1) each required proof of a fact not necessary for the other, (2) if an acquittal of one would

not bar prosecution of the other, and (3) if each could be punished separately. The court went on to state:

> It is the punishment prescribed which makes an act a crime, not a mere interdiction of conduct without punishment. 89 F.Supp. at 64.

In holding that the indictment in its present form was fatally flawed with duplicity, the court further stated:

> I realize it has long been the practice in this district to follow the form of indictment issued here. But mere multiplication of error cannot make law. 89 F.Supp. at 65.

Similarly, Petitioner ZAVALA argues that the indictment under which he was charged is duplicitous, thereby depriving him of knowing which crimes he was found guilty of commiting as well as subjecting him to double jeopardy. As discussed by the court in United States v. Martinez-Gonzales, supra, merely

because it may be the practice of some Grand Juries within the Ninth Circuit to issue duplicitous indictment, it does not thereby become either legal or proper to do so.

In Sepulveda v. Squier, 192 F.2d 796 (9th Cir. 1951), the defendant was charged in four separate counts with transporting into the United States four named aliens. On appeal, the defendant contended that only one offense had occurred for which he could receive but one punishment, since the aliens were all transported at one time. In rejecting the defendant's contention, this court stated that:

> Logically it would seem that the offense as appertaining to each alien should be set forth in separate counts so that the court may intelligently impose sentence. Otherwise, the judge cannot certainly know whether a general verdict of guilty imports a finding that all

> the aliens named, or only some of them, had been illegally brought in. 192 F.2d at 798.

Similarly, in Jones v. United States, 260 F.2d 89 (9th Cir. 1958), the defendant contended that he should have been charged with only one count of transporting aliens and not four separate counts, since all four aliens were transported at the same time and in the same way. The Ninth Circuit rejected appellant's argument that he was subjected to more than one punishment for the same offense and stated that the statute provides for cumulative punishment for each alien transported. As discussed previously, it is the punishment prescribed which makes an act a crime, with the imposition of punishment being a test to determine whether one or two crimes has been committed. United States v. Martinez-Gonzales, supra.

In Vega-Murrillo v. United States, 247 F.2d 735 (9th Cir. 1957), the defendant was charged in a three-count indictment with transporting three aliens. Again, this court rejected defendant's argument that he was guilty of but one offense, stating that cumulative punishment for each person transported is provided for by the statute.

In Vega-Murrillo, Sepulveda, and Jones, supra, this court has found that charging the defendant with separate offenses in separate counts for each alien transported is not an improper form of indictment. Moreover, in the Sepulveda decision, this court specifically recognized the problems that would occur from charging the defendant in any other manner.

REASONS FOR GRANTING THE WRIT

Certiori should be granted to allow this Court's powers of supervision to remedy the lower court's departures from the accepted and usual course of judicial proceedings.

First Issue

The first issue presented is whether Petitioner was denied a fair trial due to judicial misconduct and the erroneous rulings of the trial court. The denial of a fair trial comprised at least four distinct aspects.

First, over the objections of defense counsel, the trial court repeatedly permitted government witness William Danielson to give testimony that lacked sufficient foundation to show that he had personal knowledge of the matters.

Danielson was allowed to characterize people as "aliens" and "Mexican" without any basis being established for such an opinion or characterization. He was also allowed to testify that money paid by the "aliens" was given to Hymie (Petitioner ZAVALA). Again, no basis beyond the witness' assumption or speculation was ever established for that statement. Timely objections were made by defense counsel, but overruled, after each occurance. Rule 602 of the Federal Rules of Evidence states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

In commenting upon the applicability of this Rule, Moore's Federal Practice, Second Edition, Volume 10, §602.02 states:

> A proper foundation showing the opportunity to acquire the requisite knowledge is a condition precedent to permitting the witness to testify and if a timely objection is made that the witness lacks sufficient personal knowledge to fulfill this condition, normally he should not be permitted to testify until the proper foundation is laid.

The witness' unfounded characterization of these people as "aliens," together with his unsupported statement that the money to transport these "aliens" was given to petitioner, was extremely prejudicial since it tended to establish those facts as proven in the eyes of the jury, when in fact no such proof existed.

Next, the trial court committed judicial misconduct which denied petitioner a fair trial. This judicial misconduct was manifested by:

1. The disparagement of defense counsel in the presence of the jury

thereby conveying to the jury the notion that the defense was friviolous or not believable.

2. The refusal of the trial court to permit side-bar discussions, or other discussions of legal or sensitive factual issues out of the presence of the jury.

3. The trial court's interposing of its opinion regarding the credibility of the government's witness.

The disparagement of defense counsel by the court must tend to seriously undermine the credibility of the defense, and of defense counsel, in the eyes of the jury. The trial court compounded this by refusing to conduct sensitive discussions at side-bar, thereby placing defense counsel in the untenable position of either arguing sensitive matters in the presence of the jury or

not pursuing the matter further. This served to effectively preclude defense counsel from fully presenting the defense since effective argument in the jury's presence would have blunted many arguments that could later have been made directly to the jury.

Clearly, the interposing of the trial court's view of the credibility of certain government witnesses exceeds the power or discretionary authority of the trial court.

The examples presented above, and a review of the tenor of the trial in general, clearly establishes that the trial court's erroneous rulings and judicial misconduct denied him a fair and impartial trial.

Third, the trial court erred in not granting petitioner's motion for judgment of acquittal. The standard applied as to whether a judgment of

acquittal should be granted is:

> viewing the evidence presented most favorably to the government, a reasonably minded jury could accept the relevant and admissible evidence as adequate and sufficient to support the conclusion of Defendant's guilt beyond a reasonable doubt. U.S. v. Kohlman, 491 F.2d 1250 (5th Cir. 1974).

In this case, absolutely no evidence was presented during the trial to support the government's assertion that the individuals in question (alleged aliens) had entered the United States in violation of the law or that their last entry into the United States occurred less than three years prior. Yet this is an essential element of the charged offense. There is not even an issue as to whether the evidence was adequate and sufficient, since there was none at all.

Where evidence is insufficient and does not meet the Kohlman standard, defendant is entitled to a judgment of

acquittal, U.S. v. Jones, 58 F.2d 219 (6th Cir. 1978); King v. U.S., 426 F.2d 278 (9th Cir. 1970). Accordingly, the trial court's refusal to grant Petitioner's judgment of acquittal was error.

Last, the trial court failed to properly instruct the jury regarding the applicable law. This failure was compounded by the representation to defense counsel that certain instructions would be given, which the trial court then failed to do.

The trial court totally misled defense counsel. It did so by stating that it would give certain instructions, then, without prior notice to defendant's counsel, gave only portions of its approved instructions. Further, in other instances it refused or neglected to give instructions already approved. Additionally, the trial court did not permit

defense counsel a copy of the court's proposed jury instructions. This placed counsel at a distinct disadvantage in trying to follow what the court was saying while simultaneously trying to determine whether the court had followed its approved instructions. Finally, when defense counsel attempted to make specific and detailed objections to the court's instructions the court proceeded to cut counsel off.

The trial court's practice of first leading counsel to believe that instructions would be given, only to "prune" substantial portions of some and leave out others completely, was inherently unfair and in violation of both the letter and the spirit of Rule 30, Federal Rules of Criminal Procedure.

Second Issue

The second issue presented is whether petitioner's constitutional right

to confrontation was abrogated by the trial court's limitation of the cross-examination of the government's witness, William Danielson.

During cross-examination, key government witness William Danielson testified that he had previously cooperated with law enforcement agencies in transporting cases. Defense counsel was prevented from making further inquiry into the witness' involvement to develop any resulting bias, prejudice or interest that he might have (RT82-83).

The limitation of the right to effectively cross-examine this witness regarding any bias, prejudice or interest had the effect of denying petitioner the right to confront the witnesses against him. The Sixth Amendment right to confrontation is embodied largely by the right to vigorously cross-examine adverse

witnesses. U.S. v. Harris, 501 F.2d 1 (9th Cir. 1974). Cross-examination is the singular most effective method of distilling the credible evidence from the testimony presented. If the right to effectively cross-examine is denied or seriously limited, confrontation is abrogated and constitutional error exists without the need to show actual prejudice. Davis v. Alaska, 415 U.S. 308 (1974). A "right" that is seriously limited ceases to be a right and becomes merely a discretionary privilege.

Third Issue

The third issue presented is whether the Government's action in deporting every one of the alleged aliens denied petitioner due process of law and the right to compulsory process.

The government deported, or directed the voluntary return to Mexico of every one of the alleged aliens it

had apprehended in connection with this case. The Ninth Circuit has held that it is a denial of due process of law and the right to compulsory process for the government, in an alien transportation case, to deport the aliens before the defendant has an opportunity to interview them. United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971).

The government's action in this case was a direct denial of the petitioner's constitutional rights as implemented by Mendez-Rodriguez, supra.

Fourth Issue

The fourth and last issue presented is whether the indictment under which petitioner was charged was so constitutionally defective as to warrant reversal of the resulting convictions. The indictment suffered from two major flaws, vagueness and duplicity.

Count I of the indictment charges Petitioner with Conspiracy in violation of 18 U.S.C. §371 between the approximate period of March 10, 1978 through May 31, 1979. The trial testimony consisted of speculation and haphazard testimony by the government's witnesses regarding twenty or more trips, the dates of which could be established with no more accuracy than that they were "around February or March" (RT310), "in the last part of February" (GB10), or "approximately mid-March" (Count V of Indictment). A pre-trial Motion for Bill of Particulars (CR128) was filed, but denied by the trial court, in an effort to determine the factual basis for the government's allegation with some degree of specificity.

Without the protection afforded an accused by the Sixth Amendment's requirement that he "be informed of the

nature and cause of the accusation" which "is basic to the proper functioning of our adversary system of justice" United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1970), petitioner was required to answer for his conduct throughout an approximate fifteen month period. This is particularly egregious in a Conspiracy prosecution where even lawful acts can provide a factual basis to support the allegation. By failing to properly inform petitioner of the "nature and cause" of the government's accusation, it was virtually impossible for him to defend against the accusation.

Count II of the indictment alleged that petitioner (and others) ". . .knowing that approximately 28 aliens were in the United States illegally and knowing or having reason to believe that those aliens' last entry into the United States occurred less than three years prior

thereto, did knowingly and intentionally transport and move, and attempt to transport and move, those aliens within the United States . . ." in violation of 18 U.S.C. §1324(a)(2). No effort was made to further identify the "aliens" and petitioner's pre-trial efforts to do so were thwarted by the government's conduct of removing these individuals from the United States, without any effort to identify them before doing so. Thus, petitioner was required to defend against an allegation that he transported some number (but no more than approximately 28) of "aliens" (who are in no manner identified either by name or even by nation of origin) over the period of approximately March 25-29, 1978 at a locations somewhere within the United States. Based upon the meager information presented in the indictment, it would be

unrealistic to expect petitioner to be able to present evidence to rebut the allegation.

Both counts were duplicitous because there is no way of knowing the jury's mind regarding their verdict. The jury could have easily found that Petitioner was guilty of conspiring to transport some, but not all, of the "aliens" in Count I and did in fact transport some, but not all, of the "aliens" of Count II. Having been afforded no opportunity to return a verdict finding petitioner guilty of conspiracy or transporting of particular individuals, the jury was simultaneously denied the opportunity to find petitioner not guilty of conspiracy or transporting of any particular individuals.

As a result, the jury verdict affords petitioner absolutely no protection from a second prosecution for these

same alleged offenses. Whether a jury acquitted him, or convicted him, on any alleged crime, petitioner is vulnerable to prosecution again since the identity of the individuals involved in the original allegations is completely unknown. Since a separate punishment is provided for each "alien" transported, Rule 8(a) of the Federal Rules of Criminal Procedure requires that each crime must be alleged in a separate count. Similarly, Rule 7(c) of the Federal Rules of Criminal Procedure require an indictment to be a plain, concise and definite written statement of the essential facts constituting the offense charged. The indictment was hopelessly deficient when measured against either standard.

This specific issue was addressed in United States v. Martinez-Gonzales, 89 F. Supp. 62 (S.D.Ca. 1950). In that case,

the defendant was charged with transporting four aliens, but convicted of transporting only one. The court held that because the indictment charged more than one substantive offense per count it was duplicitous. As a result, the conviction was overturned.

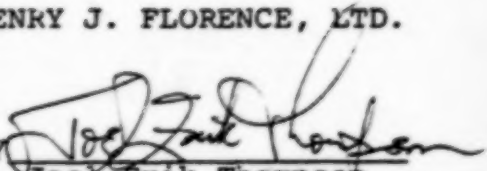
By charging petitioner in an indictment that was vague and duplicitous, the government prevented petitioner from both defending himself effectively against the allegations, and from knowing of what crimes he was convicted. Due process, fairness and the Federal Rules of Criminal Procedure require much more.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 24th day of July, 1981.

HENRY J. FLORENCE, LTD.

By 
Joel Erik Thompson
Attorneys for Petitioner

APPENDIX "A"

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America vs.

Docket CR-80-26

JOSE ZAVALA-PIZANO, Defendant. TUC-JAW (TFM)

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person this date April 24, 1980 with counsel Henry Florence, Esq.

PLEA: Not Guilty.

There being a verdict of Guilty Ct. 1 & 2

Defendant has been convicted as charged of the offenses of violating Title 18, United States Code, Section 371, conspiracy to transport illegal aliens as charged in Court I and violation of Title 8, United States Code, Section 1324(a)(2) as charged in Count II of the Indictment filed herein.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby cc.mitted to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on each of Counts I and II and fined the sum of Ten Thousand ($10,000.00) Dollars on Count I. The terms of imprisonment imposed shall run or be served consecutively. The fine imposed is a committed fine.

FILED
Apr. 24 2:21 p.m.'80
W.J. Furstenau, Clerk
U.S. District Court for the
District of Arizona
By_____
Deputy Clerk

SIGNED BY: U.S. District Judge

/s/_____
Thomas F. Murphy
Date: 4/24/80

APPENDIX "B"

TITLE 8 United States Code §1324(a)(2) in pertinent part:

Any person, . . .who knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, within the United States by means of transportation or otherwise, in furtherance of such violation of law any alien, including an alien crewman, not duly admitted by immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this act, or any other law relating to the immigration or expulsion of aliens shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not exceeding $2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs. (Emphasis added.)

18 United States Code §371

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any acto to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

APPENDIX "D"

FILED
MAR 30 1981

Richard H. Deane
Clerk, U.S. Court of Appea

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	Nos. 80-1264
Plaintiff-Appellee,	)	80-1265
	)	80-1266
v.	)	80-1267
	)	
IDULFO ZAVALA-PIZANO, BILL GENE MORGAN, TRUMAN ROBERTS, and GERALD WAYNE DODSON,	)	MEMORANDUM
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the District of Arizona

The Honorable Thomas F. Murphy, Presiding Argued and Submitted December 9, 1980.

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge.

Appellants in this consolidated appeal were indicted by a federal grant jury on one count of conspiracy to transport illegal aliens, in violation of 18 U.S.C. §371, and from one to

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

six counts of transporation of illegal aliens, in violation of 8 U.S.C. §1324(a)(2). Following a jury trial, all appellants were convicted on the conspiracy count and at least one transportation count. Appellants raise numerous issues on appeal, most of which are common to two or more parties.

Appellants argue that the evidence produced by the Government at trial is insufficient to support their convictions on the transportation counts. In reviewing the sufficiency of the evidence to support a conviction, the reviewing court views "the evidence in the light most favorable to the Government. The verdict of the jury will be upheld if there was relevant evidence from which the jury could reasonably have found the defendant guilty beyond a reasonable doubt." United States v. Friedman, 593 F.2d 109, 115 (9th Cir. 1979) (citations omitted). Several persons who had participated in the smuggling operations gave testimony regarding the

person who were transported and the details of the trips which were made and money that was paid. We hold that there was sufficient evidence to support the finding of the jury.

Appellants next argue that their convictions should be reversed because the trial court improperly instructed the jury. While the instructions were not given in the exact form recommended by the parties, we hold that the instructions as given were adequate. The trial court has "substantial latitude in tailoring [jury] instructions." United States v. James, 576 F.2d 223, 226 (9th Cir. 1978). Challenges to the "language or formulation of the charge are reversible only for an abuse of discretion." Id. at 227. There was no abuse of discretion here.

Appellants argue that their convictions should be reversed as a result of the duplicitous nature of the indictment under which they were charged. The relevant statute, 8 U.S.C.

§1324(a)(2), provides that a five-year sentence may be imposed for each alien transported. Appellants assert that the indictment must thus contain a separate count for each alien, rather than charge the transportation of numerous aliens in each count. None of the appellants received more than a five-year sentence on any one count, however. They were thus not prejudiced by the form of the indictment.

Appellants also attack the indictment for lack of specificity. As a result of the conspiracy count, appellants had to be prepared to defend against charges that smuggling trips took place during the entire time period in question. They were thus not sufficiently prejudiced by any lack of specificity in the indictment to require reversal.

Appellants assert that the trial judge committed reversible error by commenting on the veracity of a government witness, by allowing witnesses to describe the persons

transported as "alien," and by refusing to permit sidebar conferences. A review of the record reveals that the trial judge was not in reality commenting on the witness's veracity. Rather, he was attempting to expedite cross-examination by pointing out that the questioning was repetitive. The use of the word "aliens" did not prejudice appellants sufficiently to require reversal. We note that the witnesses did not call the persons transported "illegal aliens." It was not improper for the jduge to refuse sidebar conferences under the circumstances.

Finally, appellants assert that they were denied due process by the Government's action in returning potential witnesses to Mexico. See United States v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir. 1971). The trial court held a hearing on this issue below and found that the release of the aliens who returned to Mexico was not improper. We agree; the defendants in this case had not been charged with any offense at the time of the release.

The remaining issues raised by appellants are without merit.

The convictions are AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee, vs. IDULFO ZAVALA-PIZANO, BILL GENE MORGAN, TRUMAN ROBERTS, and GERALD WAYNE DODSON, Defendants-Appellants.	)	Nos. 80-1264 80-1265 80-1266 80-1267 ORDER

Appeal from the United States District Court for the District of Arizona

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearings. Judges Hug and Canby have voted to reject the suggestions for their rehearings en banc and Judge East recommends rejection of their suggestions.

The full court has been advised of the en banc suggestions and no judge of the court has requested a vote on them. Fed. R. App. P. 35(b).

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

The petitions for rehearings are denied and the suggestions for hearings en banc are rejected.

FILED

June 16, 1981

Richard H. Deane
Clerk, U.S. Court of Appeals

FILED
July 6, 1981
Richard H. Deane
Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. IDULFO ZAVALA-PIZANO, BILL GENE MORGAN, TRUMAN ROBERTS, and GERALD WAYNE DODSON, Defendants-Appellants.	Nos. 80-1264 80-1265 80-1266 80-1267 ORDER ON MOTIONS FOR STAY OF MANDATE

Before: HUG and CANBY, Circuit Judges, and EAST*, District Judge

Upon application of counsel for the appellants, Zavala-Pizano, Morgan and Roberts, and good cause appearing therefor,

IT IS ORDERED that, under Rule 41(a) of Fed. R. App. P., the issuance of the mandate of this court in each cause above, be and hereby stayed, as to the three named appellants, pending the filing with, and consideration and disposition by, the Supreme Court of the United States, of petitions for writs of

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

certiorari to be made by the three named appellants, provided each such petition is filed in the United States Supreme Court Clerk's Office on or before July 26, 1981. In the event any such petition for writ of certiorari is granted, this stay will continue pending the final disposition of any such case by the Supreme Court of the United States, pursuant to Rule 41(b), Fed.R.App.P.

/s/ HUG
United States Circuit Judge

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PROOF OF SERVICE

I, JOEL ERIK THOMPSON, attorney for appellant IDULFO ZAVALA-PIZANO, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of July, 1981, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States as follows:

Gerald S. Frank, Esq.
Assistant United States Attorney
Post Office Box 1951
Tucson, AZ 85702

Richard R. Schmal, Esq.
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Feller & Cohen
727 East Bethany Home Road
Phoenix, Arizona 85014
Attorneys for Gerald Wayne Dodson

by mailing a copy in a duly addressed envelope, with first class postage prepaid.

It is futher certified that all parties required to be served have been served.

/s/

Joel Erik Thompson
Attorneys for Petitioner
IDULFO ZAVALA-PIZANO

13 West Jefferson Street
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